No. 21253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the use and benefit of FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the District Court of the United States, Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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I.

Whether Appellant Filed Its Suit Within One Year From the Last Furnishing of Material Is Not an Issue.

Although Appellee's first motion for summary judgment mentioned the suit limitation period set forth in Section 270b(b) of Title 40 U.S.C., the court did not consider this matter, and the Appellee's second motion for summary judgment did not mention it. Consequently, any discussion of the one year suit period is not pertinent to the questions presented in this appeal. The only issue involved is that of TIMELY NOTICE.

II.

There Is a Very Real Dispute as to the Date Appellant Last Furnished Material.

While Appellee states on page 4 of its brief that there is no dispute as to the fact that no later than October 31, 1963 the Appellant had furnished all required materials to the project, there is nothing in the affidavits filed by the Appellant which supports the claim of Appellee that the last day of delivery was October 31, 1963. In fact, there seems to be a conflict in the affidavits of Appellee on this matter. Mr. Preger says in his first affidavit that no flooring was delivered to the job site by either L. D. Reeder Company or Floating Floors after July 31, 1963. [R. 23.] In his second affidavit, he states that no flooring was delivered to the job site by either L. D. Reeder Company or Floating Floors after April 18, 1963. [R. 73.] However, in the Memorandum of Points and Authorities accompanying both the first and second motions for summary judgment the date mentioned is December 31, 1963. [R. 19, 69.] Of course, if the Appellee adopts the latter date, December 31, 1963, as the date material was last supplied by Appellant, then the letter dated March 27, 1964 which was attached as Exhibit "B" to the second affidavit of Preger, at page 77 of the Record, and as Exhibit "F" to the first affidavit of Preger, set forth at page 33 of the Record, and which was admittedly received by Shiff, would be adequate notice to Shiff within 90 days from this furnishing.

III.

Appellee Has Overlooked the Relationship Between Commercial and Appellant.

United States of America for the use of Bernard J. Weithman and Charles M. Weithman, a partnership dba Weithman Masonry and Const. v. The Buckeye Union Casualty Company, 207 Fed. Supp. 552 (U.S.D.C.—Ohio 1962) is plainly inapplicable to the present situation. In *Weithman,* it appeared, as Appellee states on page 6 of its brief, that the repair work was done by a third party—Miller—under an independent service contract. Clearly that is not the situation in the present case. Shiff itself acknowledges that the original materials were secured by Appellant from Commercial. It is Appellant's contention in this appeal that the affidavits filed by it establish that the replacement panels, being manufactured by Commercial for Appellant were the property of Appellant when shipped by Commercial to Shiff. Therefore, there was no independent furnishing or performance by Commercial, as was the situation existing in *Weithman.* Appellee overlooks the fact that Appellant also received an invoice for the replacement panels.

Appellee erroneously concludes that there was no contract existing between Commercial and Appellant for the furnishing of the replacement panels as of February 20, 1964. While it is true that Commercial stated that it would not furnish the replacement panels at its own expense, if there had been misuse or improper installation, the fact remains that the replacement panels would

in any event be furnished to Appellant, who was the party with whom Commercial was dealing. There are no facts which support Appellee's statement on page 10 of its brief that "The manufacturing of these panels was for Commercial's inventory and not for the Appellant. . . ." The primary fact overlooked by the Appellee is that the affidavits filed by the Appellant show that the replacement panels were manufactured for the Appellant's use and were its property at the date of shipment.

Appellee's analysis of *United States for the use and benefit of P. A. Bourquin and Co., Inc. v. Chester Co., Inc. et al.*, 104 F. 2d 648 (2d Cir. 1939) fails, for it does not recognize 1. Appellant received an invoice for the replacement panels as well as the previous material. 2. If Commercial had not been paid directly by Shiff, it would have looked to Appellant, to whom the materials were supplied.

There is, of course, a dispute as to whether Appellant refused to ship the replacement panels. In his affidavit, Mr. Beere stated, regarding his March 17, 1964 conversation with Shiff, "I categorically deny that I, or anyone else representing Floating Floors, at any time refused to furnish the replacement panels. I did tell him that we were reluctant to release the replacement panels until we had clarified Reeder's status so we could determine how we were to be paid, not only for the original parts, but the replacement parts as well." [R. 103.] Appellant submits that withholding furnishing until such time as Reeder's status had been clarified does not amount to an unqualified refusal, as Appellee would have the court believe.

IV.

Appellee Has Erroneously Equated the Furnishing of the Replacement Panels With Mere Repairs.

Appellee attempts to distinguish *United States v. Gunnar I. Johnson and Son, Inc.*, 310 F. 2d 889 (8th Cir. 1962) unsuccessfully from the present situation. In both the cited case and the present case the facts presented show that the furnishing of additional material constituted a completion of performance of the contract, rather than a mere repair.

The only reason why Appellant is not making a claim for the value of the replacement materials is because Commercial, its supplier, has been paid for these items. However, this does not alter the fact that the replacement panels belonged to Appellant and were furnished by Appellant. If a determination had been made that Commercial was not responsible for the replacement of the panels, and Commercial had thus charged for the replacement panels, as it did, then Commercial would have looked to Appellant. Under those circumstances, Appellant would have paid Commercial and attempted to collect the balance from Shiff or Reeder. What possible difference can it make that this circuitous route was not followed?

United States for use of McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp., 188 Fed. Supp. 381 (U.S.D.C. Pa. 1960) obviously does not involve the same situation as the one at hand. In that case, the court, *after a trial*, held that the additional labor performed was not part of the original performance of the contract. Appellant contends that the affidavits filed by it sufficiently present a genuine issue of material fact as to whether the furnishing of the re-

placement materials constituted a completion of Appellant's contract.

Conclusion.

For the reasons stated in Appellant's Opening Brief and on the basis of the comments above, it is respectfully submitted that the District Court erred in concluding that there was not a genuine issue of material fact concerning whether the Appellant in fact last furnished material for the job on March 31, 1964 and concerning whether the notice given on June 12, 1964 was timely and, therefore, the judgment below should be reversed and the case tried on its merits.

Dillavou & Cox,
By Michael M. Weekes,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL M. WEEKES